Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of the Local	)	
Competition Provisions of the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	
	)	
Joint Petition of BellSouth, SBC,	)	
And Verizon for Elimination of	)	
Mandatory Unbundling of	)	DA 01-911
High-Capacity Loops	)	
And Dedicated Transport	)	

COMMENTS OF VOICESTREAM WIRELESS CORPORATION

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The RBOC Joint Petition completely ignores the CMRS industry and its dependence on RBOC provisioning of high-capacity circuits. The RBOCs, to date, have refused to provide VoiceStream with UNEs, perhaps explaining why wireless carriers are not referenced in the Joint Petition or taken into consideration in the underlying data analyses.

It is premature for the Commission to eliminate the availability of any UNEs. CMRS carriers have been – and continue to be – impaired by lack of access to UNEs. The RBOCs mischaracterize the dramatic changes in the telecommunications market since implementation of the 1996 Act – today's current financial woes overshadow the earlier periods of facilities growth.

High-capacity loops and dedicated transport facilities continue to meet the Commission's impair test. Such facilities, though more readily available than before, are not ubiquitously available either through self-supply or third party provisioning. When deprived of UNEs, the ILECs' competitors are impaired by increased delay, increased cost, and decreased safeguards. The UNE model has encouraged the growth of competition and investment, and the Commission should reject the relief the Joint Petitioners seek. Furthermore, it should ensure that the RBOCs provide such UNEs to all telecommunications carriers – including the CMRS industry, a significant competitor to landline-based ILECs for residential telephone service.

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COMMENTS OF VOICESTREAM WIRELESS CORPORATION

VoiceStream Wireless Corporation ("VoiceStream"), by its undersigned attorneys, submits these comments in response to the April 5, 2001, Joint Petition of BellSouth Corporation ("BellSouth"), SBC Communications, Inc. ("SBC"), and Verizon Telephone Companies ("Verizon") (collectively, "the Joint Petitioners" or "RBOCs"[1]) filed in the above-captioned proceedings. The Joint Petitioners essentially ask the Federal Communications Commission ("Commission") to reverse its *UNE Remand Order* of November 5, 1999,[2] by eliminating high-capacity loops and dedicated transport from the list of unbundled network elements ("UNEs") that the Commission requires incumbent local exchange carriers ("ILECs") to offer to requesting telecommunications carriers.

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[1] Notably absent as a fellow petitioner is the fourth remaining RBOC, Qwest Communications, which apparently does not care to join in the strategy undertaken by the other three RBOCs.

[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

This instant initiative represents yet another effort of the RBOCs to dismantle the framework that the Commission established in accordance with the mandate of the Telecommunications Act of 1996 ("1996 Act") to promote competitive entry into local telecommunications markets. The RBOCs have filed for Commission reconsideration of the *UNE Remand Order,* and appealed it to the D.C. Circuit.[3] Further, they are supporting anticompetitive legislation that essentially would emasculate the Section 271 process and impede competitive entry into the advanced services market.[4] By outright rejection or by using a variety of excuses, they have refused to grant eligible CMRS carriers – including VoiceStream – access to the UNEs to which they are clearly entitled.[5] The Commission should deny the relief the Joint Petitioners seek and direct them to provide UNEs to all carriers – including CMRS carriers – on a reasonable and timely basis.

I. THE RBOCS' PETITION COMPLETELY IGNORES THE CMRS INDUSTRY AND ITS DEPENDENCE ON RBOC PROVISIONING OF HIGH-CAPACITY CIRCUITS

The Joint Petitioners ignore the very existence of CMRS carriers.[6] Although the Joint Petition describes network configurations and market conditions attributable to

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[3] *United States Telecom Association v. Federal Communications Commission*, Nos. 00-10115 & 00-1025, (D.C. Cir. 2001).

[4] H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, proposes to allow the RBOCs to enter high-speed and data transmission markets by lifting the ban on interLATA traffic the 1996 Act imposed upon them.

[5] *See infra* pp. 5-7 for discussion of VoiceStream's inability to obtain UNEs from the RBOCs.

[6] The RBOCs also ignored CMRS carriers in their recommendation that served as the basis for the Commission's three-prong test demonstrating adequate provision of local exchange service to qualify for UNEs. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587, 9598, ¶ 6 (2000) ("*Supplemental Order Clarification*"). Now, many of them seek to unfairly hold CMRS carriers to the inapposite standards of the *Supplemental Order Clarification* to avoid converting the CMRS carriers'

interexchange carriers ("IXCs") and CLECs, it fails even to acknowledge the local network architecture and market build-outs of the CMRS industry. While CLECs may typically provide service in dense urban areas, and IXCs aggregate traffic in concentrated locations, the network requirements of CMRS carriers – by their very nature – are quite different. Therefore, even if the arguments in the Joint Petition were correct with respect to IXCs and CLECs (and VoiceStream submits they are not), the conclusions of the Joint Petitioners cannot and do not apply to CMRS carriers. The RBOCs' data and analysis completely ignores the circumstances of CMRS carriers, and the requested relief would deny CMRS providers access to UNEs.

There are pure policy reasons, discussed more fully below, that preclude the Commission from revisiting the mandatory national list of UNEs at this time, even for IXCs and CLECs. However, the Commission is estopped from revisiting it with respect to CMRS carriers for the further reason that the RBOCs have submitted **no record evidence whatsoever** concerning the network configurations of CMRS carriers or their dependence upon ILEC high-capacity circuit provisioning.

The RBOCs have never provided UNEs to CMRS carriers, and the Commission must not let the incumbents escape this important obligation simply by lumping CMRS carriers together with all other telecommunications service providers. The wholesale denial of UNEs to CMRS carriers is particularly troublesome in light of the fact that CMRS carriers offer the most promising competitive alternative for residential phone customers – a market segment that otherwise has generally been denied the benefits of local competition.

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special access facilities to UNEs and UNE combinations.

The geographical characteristics of the CLECs' business customers markets have nothing in common with the mass-market availability of CMRS service. CMRS customers are generally individuals who use the local service functionality while working, shopping, travelling, or even sitting on their living room sofas. The cell site architecture of wireless networks must be able to offer broad coverage to meet customer demand, and not just service in a downtown business district or a technology park. Any Commission response to the Joint Petition must take into account the specific network requirements of this category of ILEC competitors. CMRS carriers need the heretofore denied benefits associated with UNE pricing in order to offer their customers lower rates that are value-competitive with ILEC landline consumer service, especially with the CMRS deployment of advanced wireless data services.

II. IT IS PREMATURE FOR THE COMMISSION TO ELIMINATE THE AVAILABILITY OF ANY UNES

A. CMRS Carriers Are Impaired by the Lack of Access to UNEs

VoiceStream submits that the demonstrated failure of the RBOCs to provision UNEs to all carriers who have requested them is reason enough to deny the instant Joint Petition. VoiceStream and AT&T Wireless ("ATTW") have actively sought Commission intervention to obtain UNEs and UNE combinations from ILECs. Specifically, VoiceStream has asked the Commission (1) to advise the ILECs that they must provide CMRS carriers access to UNE pricing, and (2) to clarify that the three-criteria test of the *Supplemental Order Clarification* has never applied to CMRS carriers,[7] and was never

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[7] In response to ILEC concerns that premature elimination of IXC access charge revenues could substantially harm the ILECs, the Commission issued an order – proscribing IXCs from substituting UNE combinations for "special access services" unless "they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." *Implementation of the Local*

intended to apply to anyone other than CLECs and IXCs. To date, the ILECs have failed to respond satisfactorily to the requests of VoiceStream and ATTW, despite the fact that the 1996 Act equally entitles CMRS carriers to obtain UNEs.[8] Indeed, VoiceStream considers it more than a coincidence that only a few days after VoiceStream and ATTW met with Commission Staff to seek assistance in urging the RBOCs to convert their special access facilities to UNEs, the RBOCs filed the instant Joint Petition.[9]

Section 251(c)(3) of the 1996 Act requires ILECs to provide requesting telecommunications carriers nondiscriminatory access to UNEs at rates, terms, and

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Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Supplemental Order*, 15 FCC Rcd 1761, 1762, ¶ 2 (1999) ("*Supplemental Order*") The Commission later clarified the three criteria that a requesting carrier must meet in order to be deemed to provide "a significant amount of local exchange service." *Supplemental Order Clarification*, 9620, ¶ 22. Options 1 and 2 require one end of a UNE to terminate to a carrier's collocation arrangement, and, respectively, require the requesting carrier to be the end user's only local service provider, and provide one third of the end user's local traffic. Option three requires that at least 50% of the traffic be local as "measured based on the incumbent's local exchange area." (*Id.*)

ILEC rejections of CMRS carriers' requests for UNE-priced facilities based on CMRS carriers' failure to meet these CLEC-designed criteria are wholly inappropriate. These use restrictions were designed for wireline CLECs, and the Commission never intended to apply these restrictions to requesting CMRS carriers. First, the risk of IXC arbitrage was the justification for the criteria established in the *Supplemental Order Clarification*. CMRS carriers were never the focus of ILEC concerns, nor of this Commission's Order. CMRS carriers do not offer "local exchange service." Nor do they "collocate" facilities in ILEC central offices. CMRS carriers offer local service defined by Metropolitan Trade Areas they serve, and not central office-defined telephone exchanges. Thus, CMRS usage of the ILECs' loop and transport facilities is not at all comparable to IXCs, and does not raise any arbitrage issues as were raised by the prospect of IXCs obtaining such facilities under the premise of providing local exchange service.

[8] BellSouth alone is beginning to respond somewhat positively to VoiceStream's request for conversion of special access facilities to UNEs. Although it has agreed to convert a limited number of high-capacity circuits to UNEs, however, it will not convert any such facilities if they interconnect with tariffed services since the *Supplemental Order Clarification* prohibits loop-transport combinations from being connected to ILEC tariffed services. *Supplemental Order Clarification*, 9598-99, ¶ 22. Because VoiceStream submits that application of the *Supplemental Order Clarification* in its entirety should not apply to CMRS carriers, it also objects to BellSouth's efforts to squeeze additional exceptions out of the language of the order.

[9] In February and April 2000, respectively, VoiceStream ATTW, and United States Cellular Corporation met with the Commission and wrote it, describing the barriers they had faced in trying to obtain UNE pricing. Further, VoiceStream, through its predecessor in interest, Omnipoint, first requested UNE pricing from Verizon, f/k/a Bell Atlantic, on February 15, 2000. Only weeks later, the RBOCs raised the issue of IXC access.

conditions that are just, reasonable, and nondiscriminatory.[10] By definition, CMRS providers are "telecommunications carriers" that provide a "telecommunications service."[11] These definitions, on their face, apply equally to *any* telecommunications carrier for the provision of *any* telecommunications service. Moreover, in its seminal *Local Competition Order*, the Commission confirmed that CMRS providers are telecommunications carriers eligible for access to UNEs.[12] Since ILECs routinely provide themselves special access circuits as a combination of loop and transport, they are obligated by the 1996 Act and the Commission's *UNE Remand Order* to provide these facilities as UNE combinations to CMRS providers at UNE prices.[13] VoiceStream renews its request that the Commission take action to ensure CMRS carriers' equal access to these essential network facilities at cost-based pricing.

B. The UNE Remand Order's Three-Year Quiet Period Should Be Respected

When the Commission adopted the three-year review quiet period for review of its list of mandatory UNEs, it sought to establish a reasonable period of certainty for CLECs and their investors for the 1996 Act's pro-competitive initiatives to take hold. In

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10 47 U.S.C. § 251(c)(3)(2001)

11 *Id.* at §153(44) and (46)(2001).

12 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,*CC Docket No. 96-98, *First Report and Order,* 11 FCC Rcd 15499, 15517 (1996) ("*Local Competition Order*"), aff'd in part and vacated in part sub nom., *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. V. FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and remanded, *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration,* 11 FCC Rcd 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking,* 12 FCC Rcd 12460 (1997), further recon. pending.

13 *UNE Remand Order* at 3909, ¶ 481. The Commission notes that ILECs "routinely combine loop and transport elements for themselves," and that they "routinely provide the functional equivalent of the EEL ("Enhanced Extended Link") through their special access offerings," and thus must make the same facilities available to requesting carriers. *Id.*

doing so, it rejected both a shorter two-year period requested by the RBOCs and a longer five-year period as CLECs and other competitors urged.[14] The Commission recognized that a three-year period would coincide with adoption of the next generation of interconnection agreements, and that three years would provide sufficient time for CLECs to implement their initial business plans.[15] None of the justification for mandating the availability of certain UNEs or establishing the three-year quiet period has changed in the past 18 months to require that the Commission's Order be undone. In fact, the well-documented attrition among CLECs and the financial turmoil in the telecommunications industry in general argue strongly against adding another regulatory shock to RBOC competitors by curtailing their existing rights to UNEs.

In the *UNE Remand Order*, the Commission stated it would periodically reevaluate its national rules in light of "the rapid changes in technology, competition, and the economic conditions of the telecommunications market."[16] The sudden reversal of investment in the competitive local telecommunications market illustrates only too well that a period shorter than three years is not an adequate interval during which to evaluate the long-range effects of the UNE framework. The RBOCs' observation that carriers "are continuing to receive financing for. . . deployment [of fiber networks] even in the face of a tight capital market,"[17] is a myth. As recently reported, "more than 30 CLECs have gone bust or filed for bankruptcy since October,"[18] and Merrill Lynch believes that

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14 *UNE Remand Order* at 3765, ¶ 150.

15 *Id.* at 3766, ¶ 151.

16 *Id. at* 3765, ¶ 148.

17 Joint Petition at 23.

more than half the publicly traded CLECs and data-LECs are expected to fail soon as well.[19]

The Joint Petitioner appear to base their arguments on the false assumption that the telecommunications boom that followed the adoption of the 1996 Act is continuing at the same pace as before.[20] Any statistics charting the growth over the last two years in the CLEC share of the special access market must be trended, however, in light of today's financial markets. For example, a significant number of CLECs identified in the "Fact Report"[21] as providers of alternative fiber networks have filed for bankruptcy protection under Chapter 11: ICG, e.spire, and Convergent. The assets of GST Communications have been liquidated following its bankruptcy. Other CLECs have significantly scaled back business plans and exited certain markets. Teligent and Winstar, the two leading providers of fixed wireless facilities – which the RBOCs consider a "legitimate alternative to fiber"[22] – are among the casualties of the tightening financial markets. Both have sought bankruptcy protection in the last few months. Even the giants – AT&T and WorldCom – are suffering from depressed stock prices that will constrain their ability in the near term to construct additional facilities or to enter new

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[18] Jade Boyd, Another *CLEC on the Rocks, CMP Media, Inc.*, May 28, 2001, at http://www.Internetwk.com.

[19] Jeannie Stokes, *Bankruptcy Heads Up; Just a Mention Likely Means Bankruptcy Protection*, Cahers Business Information, May 21, 2001, at 37.

[20] Joint Petition at 23.

[21] Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport, Submitted by the United States Telecom Association, April 5, 2001 ("Fact Report"), Attachment B.

[22] Joint Petition at 15.

geographic markets, and Sprint is rumored to be pulling out of the residential market altogether.[23]

The snapshot of the market on which the ILECs base their arguments has all but faded away. The dramatic market downturn in the competitive telecommunications market cautions that any Commission action at this time to support the Joint Petition could have disastrous consequences for already struggling CLECs.

III. HIGH CAPACITY LOOPS AND DEDICATED TRANSPORT CONTINUE TO MEET THE IMPAIR TEST

In the *UNE Remand Order*, the Commission identified a number of factors for determining whether a competitor is impaired in its ability to provide a certain service without access to a particular UNE. Specifically, it found that competitive carriers would be impaired if they had access only to alternative facilities that were unequal to ILEC facilities with respect to cost, ubiquity, quality, timeliness, and operations.[24] In addition to these components of the "impair" test, the Commission also considers important whether its unbundling requirements are likely to (1) encourage the rapid introduction of local competition, (2) promote facilities-based competition by CLECs, and (3) provide

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[23] Ted Hearn, *CLEC Surge Could Be Last Hurrah, May 28, 2001*, at Lexis/Nexis Library, 90 Days File.

While AT&T's efforts to leverage its cable business into the local telephone market have been disappointing (fewer than 500,000 customers added in the year 2000) (AT&T 2000 Annual report at 9), the RBOCs' success in capturing residential long distance market share in states where they have obtained 271 relief have been stellar. For example, Verizon has 4.9 million long distance customers, with 1.4 million in New York alone (representing a 20% residential market share) (Verizon Communications, Inc. Form 8K (February 21, 2001) at 5). The RBOCs' success in capturing long distance market share in areas where they are the de facto monopoly provider of local telecommunications services has led both AT&T and WorldCom to consider divesting their residential long distance service businesses. Meanwhile, the RBOCs have not actively pursued their promises to compete in areas outside their ILEC territories.

[24] *UNE Remand Order* at 3713, ¶ 23.

market certainty to attract investment.[25] VoiceStream submits that the Joint Petitioners' analysis of high-capacity loops and dedicated transport with respect to these factors is flawed, and there is no justification for modifying the mandatory UNE list at this time.

A. High-Capacity Loops and Dedicated Transport are not Ubiquitously Available through Self-Supply or Third Party Provisioning

The RBOCs spin an illusory web of "ubiquitous" facilities as a reason to eliminate certain UNEs. This fiction relies on a selected sampling of facilities in very limited locations, as well as on exaggerated claims. Although there is no denying that CLECs and other third parties have deployed intra-city fiber facilities since the implementation of the 1996 Act, it is not apparent that such facilities are either used or useful. A recent *Wall Street Journal* article, for example, notes that "[b]y some industry estimates, as much as 97% of the fiber-optic cable laid in the U.S. isn't even being used."[26] Even if this estimate were off by a few percentage points, it still suggests that just because fiber has been installed does not mean that it represents viable alternative facilities. Moreover, the mere existence of facilities at some undefined point somewhere within any market – or even multiple markets – does not render such facilities ubiquitous, even within those specific markets, or much less, nationwide. There is no denying that, collectively, CLEC fiber facilities do not even come close to providing last mile access to every building and every potential customer in the cities where they are deployed, much less in areas outside the top MSAs. Reliance on ILEC circuits is still essential.

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[25] *UNE Remand Order* at 3746, ¶¶ 103-105

[26] Almar LeTour, *How Europe Tripped Over a Wireless Phone Made for the Internet*, Wall St. Journal, June 5, 2001, at A.1.

The data the RBOCs offer today is a rehash of what they offered two years ago. Granted, instead of contending that CLECs have 30,000 route miles of fiber deployed in the top 50 Metropolitan Statistical Areas ("MSAs"),[27] the Joint Petitioners now calculate that CLECs have over 200,000 route miles total, with 635 local fiber networks in the top 150 MSAs.[28] The Commission previously rejected the RBOCs' reliance on this form of data to draw the offered conclusion, and merely increasing its magnitude does nothing to enhance its relevance.

In response to an earlier ILEC data submission, the Commission concluded that despite the deployment of CLEC facilities, there are few, if any, alternative transport facilities outside the incumbent LECs' networks that connect all or most of an incumbent LEC's central offices and interexchange carriers' points of presence within an MSA. Even where competitive alternatives exist, the alternatives generally do not travel the same routes as the incumbent's facilities.[29]

The mere growth of CLEC fiber route miles, without regard for their location or whether they are usable by competitors, does not and cannot demonstrate that adequate alternative facilities exist to support elimination of high-capacity loop and dedicated transport as UNEs. Once again, RBOC data does not speak to whether alternative facilities are available where competitors really need them, and the Commission must again conclude that "limited point-to-point routes do not necessarily allow competitive LECs to connect their collocation arrangements or switching nodes according to the

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27 *UNE Remand Order* at 3850, ¶343.

28 Joint Petition at 3.

29 *UNE Remand Order* at 3850, ¶ 343 (footnote omitted).

needs of their individual network designs."[30] The inaccessibility of these routes is even more so for CMRS carriers, who rely upon geographically diverse high-capacity DS-1 and DS-3 circuits between the downtown urban areas CLECs typically serve.

The data in the "Crandall Declaration,"[31] for example, focuses exclusively on deployment of fiber in concentrated metropolitan areas. Its analysis is premised on the assumption that special access customers are clustered exclusively in certain areas, such as "downtown, industrial parks, or college campuses."[32] Moreover, statements such as "facilities-based competition in the special access market is widespread throughout the nation"[33] must be read in light of Mr. Crandall's assumption that the special access market exists only within these concentrated geographic areas. However, CMRS carriers are among those competitors who require special access and their UNE equivalents well beyond the limited confines reflected in the RBOCs' data submissions. Any attempt to confirm ubiquity is hopelessly flawed to the extent it fails to consider operators – such as CMRS carriers – that need facilities outside these concentrated population centers.

The RBOCs' Fact Report offers similarly unpersuasive arguments and data, and the Commission must similarly discount it with respect to CMRS carriers. First, by distinguishing between the markets for special access service and basic local exchange service, it ignores the impact that the availability of UNEs could have on customers of

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30 *UNE Remand Order* at 3851, ¶ 346.

31 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport,* CC Docket No. 96-98, Reply Declaration of Robert W. Crandall (2001) ("Crandall Declaration").

32 *Id.* at 4.

33 *Id.* at 7.

CMRS carriers who use wireless service for local calls.[34] It also essentially echoes the Crandall Declaration and its analysis by claiming to provide evidence of the ubiquity of high capacity loops and interoffice transport. The data in the Fact Report suffers essentially the same flaws as those in the Crandall Declaration. Neither report proves that competitive high-capacity loops or dedicated transport are ubiquitous.

CMRS carriers have no alternative ubiquitous special access facilities from any source other than the ILECs. Since only one quarter of VoiceStream's base stations are even located in urban areas,[35] there is a clear need for facilities in the entire universe of geographic areas where only ILECs provide service, and no competitive high-capacity circuits are available. On average, VoiceStream heavily depends upon high-capacity facilities from ILECs, either through state or federal tariff or through a tariff-based contract, in over 96% of all instances.[36] The cell-based networks of CMRS carriers branch out from the center city into areas not characterized by concentrations of business customers.[37] In the majority of cases, the ILEC has the only existing network facilities in the area.

In other instances, even the ILEC does not have existing facilities where VoiceStream needs them, and the ILEC must construct them because only ILEC facilities

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[34] Fact Report at 2.

[35] Nearly 78% of VoiceStream's sites are in suburban or rural areas. This percentage will increase over time since CMRS carriers build outward from urban to suburban, and from suburban to rural areas.

[36] These figures do not include the Seattle/Portland/Spokane, Milwaukee, or upstate New York areas, but VoiceStream believes that the data are representative of those areas as well

[37] The Joint Petition's observation that CLEC fiber serves 25% of all commercial office buildings (Joint Petition at 11) is irrelevant in light of VoiceStream's network characteristics. Only 26% of VoiceStream's sites are located on large commercial buildings, but only half of these are located in urban areas, where CLECs have concentrated their networks.

are generally built-out closest to the areas that VoiceStream or other CMRS carriers serve. For example, VoiceStream may wish to provide service along a state highway, where the only telecommunications facilities within miles are the ILECs' poles and cables that run along the highway. Therefore, regardless of how many fiber networks encircle a downtown area or provide service to major office buildings, those facilities are irrelevant when they are not available to CMRS carriers to provide service to their mobile customers.

B. ILEC Competitors are Impaired by the Delay in Obtaining High-Capacity Loops and Dedicated Transport from Sources Other than the ILECs

In order to reach the location where VoiceStream needs access to dedicated transport and high-capacity loops, any non-ILEC would be required to make enormous investment, over many, many years, to expand its network. Moreover, because VoiceStream is not a CLEC, it is not in the business of deploying fiber facilities, and it relies upon ILECs and, to the limited extent it can, third parties, for these facilities.

The Joint Petitioners incorrectly state that any delays in obtaining rights-of-way access have a similar affect on them as on other entities.[38] Other fiber builders are new players and lack the historic, pre-existing relationships with municipalities and utilities that ILECs often enjoy. These new players frequently are substantially delayed in facilities construction by having to negotiate new rights-of-way agreements. Even assuming that RBOCs must negotiate such agreements, their century-long history of existing facilities in essentially the same location would certainly facilitate such negotiations. More likely than not, however, RBOCs already have the necessary

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[38] Joint Petition at 25-27.

agreements in place. Beyond rights-of-ways, the poles and conduits necessary to carry telecommunications facilities throughout an ILEC's operating area are typically either owned by the ILEC itself, or owned in conjunction with another power company. While the ILECs have immediate access to this infrastructure, competitors must obtain such access from the ILECs.

C. ILEC Competitors are Impaired by the Higher Costs of Network Elements Obtained through Self-Supply or Third Party Provisioning.

Because ILECs have denied VoiceStream the access to UNEs to which they are entitled, VoiceStream and other CMRS carriers are forced to obtain high-capacity loop and dedicated transport services from ILEC special access tariffs or under contracts based on those tariffs. VoiceStream obtains barely 3% of these circuits from CLECs.[39] The Commission already has expressly rejected the premise that competing carriers are not impaired in their ability to provide service if they can obtain the necessary facilities from a tariff. [40] As the Commission concluded in the *First Local Competition Order*, and as the Eighth Circuit subsequently affirmed, allowing ILECs to deny access to unbundled elements solely, or primarily, on the grounds that an element is equivalent to a resale service would enable ILECs to "evade a substantial portion of their unbundling obligation under 251(c)(3)." [41]

By purchasing such services from a tariff, CMRS carriers are impaired, not just by the higher rates they must pay (because tariffed rates are typically predicated upon

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[39] Further, VoiceStream self-provisions less than 1.5% of its high-capacity facilities, typically using microwave links.

[40] *UNE Remand Order* at *3732, ¶ 67.*

[41] *UNE Remand Order* at 3732, ¶ 67 *citing Iowa Utils. Bd. v. FCC, 120 F.3d at 809.*

recover of historically embedded costs), but by performance considerations as well. Of utmost importance is the fact that ILEC performance under special access tariffs is not influenced by statutory obligations or state regulations governing unbundled access to network elements, or compliance with the Section 271 competitive checklist.[42]

Lack of UNE access denies CMRS carriers such important safeguards as performance intervals and liquidated damages established by state commission rules or by negotiated or arbitrated interconnection agreements. CMRS providers lack essential enforcement remedies against bottleneck providers of special access for non-performance, poor performance, or delay, including enforcement proceedings and the ability to address ILEC compliance with the Section 271 checklist on future applications to enter the interLATA market. Moreover, as the Commission has observed, CMRS carriers are subject to associated tariff restrictions that do not encumber other carriers.[43]

D. The UNE Model Successfully Encourages the Growth of Competition and Investment, Innovation and the Deployment of CLEC Facilities

The Joint Petitioners' supporting data provides ample proof that the Commission's UNE model is, indeed, encouraging third party network investment. The RBOCs' reasoning in this regard, however, is circular and unavailing. They contend that the presence of CLEC fiber facilities proves that certain UNEs should be eliminated because their availability will harm the development of facilities-based competition. The fallacy of this argument is that it ignores that Congress envisioned the availability of UNEs as a means by which telecommunications carriers could obtain the necessary

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[42] *Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 75, 4126-27 (1999) (holding special access is not competitive checklist item).

customer base to justify installing their own facilities. Eliminating UNEs prematurely will dry up already-reduced revenue streams, and likely halt further CLEC construction altogether.

The ILECs cannot have their facilities cake and eat it, too. Either the UNE model is working – as the growth of CLEC facilities proves – or the availability of UNEs is dampening incentives for CLECs to build their own networks. VoiceStream submits that the RBOC data confirms that the Commission's UNE model is beginning to work as Congress intended by encouraging investment and deployment of facilities, albeit in limited, denser urban areas. The promise of broad and effective competition can be better served by the Commissions' requiring that ILECs provide access to high capacity UNEs to all requesting carriers, rather than to grant the ILECs the inappropriate relief they seek.

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[43] *UNE Remand Order* at 3732, ¶ 67.

III. CONCLUSION

The Commission wisely established a three-year period before reviewing the list of UNEs that ILECs are required to provide telecommunications carriers. Any changes in the market since it established the list support retention of the list, and not premature elimination of critical network components. CLECs and CMRS carriers would be impaired in their ability to offer competitive services without high-capacity loops and dedicated transport UNEs. For the foregoing reasons, VoiceStream asks the Commission to deny the relief the Joint Petitioners seek.

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